

STATE OF MICHIGAN
COURT OF APPEALS

DESERAI LAWSON, Next Friend of ZHIMON
BINGHAM, a Minor,

UNPUBLISHED
February 23, 2006

Plaintiff-Appellant,

v

KREATIVE CHILD CARE CENTER, INC.,

No. 256388
Wayne Circuit Court
LC No. 03-314614-NO

Defendant-Appellee.

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

In this negligence case, plaintiff appeals as of right an order granting summary disposition for defendant pursuant to MCR 2.116(C)(10). The grant of summary disposition was based on a finding that certain statements were inadmissible hearsay not within any exception, and that evidentiary issue is the only issue on appeal. We reverse.

We review motions for summary disposition de novo on the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id.*, 120. We ordinarily review decisions whether to admit evidence for an abuse of discretion, but our review is de novo to the extent the decision is based on questions of law. *LeGendre v Monroe Co*, 234 Mich App 708, 721; 600 NW2d 78 (1999).

According to plaintiff Lawson,¹ she left her child, Zhimon, who was then two years old, in the care of Nikki, Lawson's half-sister, while Lawson went on a trip. Lawson informed defendant of this arrangement. Nikki left Zhimon at defendant's day care center while she went to work, consistent with Lawson's normal practice. Nikki instructed defendant that Freddie Lee

¹ Our recitation of events as they were presented to the trial court should not be considered formal findings of fact.

Marks, her brother and Lawson's half-brother, would pick Zhimon up. Marks lived with Nikki and his mother, Victoria Lawson. Marks picked Zhimon up from defendant's day care. Lawson, having returned from her trip, picked Zhimon up from Victoria's residence the next day. Two days later, as Lawson was drying Zhimon off after a bath, Zhimon told her that "[his] butt [was] hurt[ing]." The trial court correctly deemed this statement admissible as a statement of Zhimon's then-existing condition under MRE 803(3). *McCallum v Dep't of Corrections*, 197 Mich App 589, 604-605; 496 NW2d 361 (1992).

Lawson asked Zhimon why his butt was hurting. Zhimon stated, "[Marks] checked out my butt." Lawson asked Zhimon what he meant by the statement and asked him to demonstrate what Marks did using two teddy bears. Zhimon took one teddy bear and placed its mouth in the other teddy bear's genital area, "as if oral sex had taken place." Marks was a convicted felon and known to be positive for HIV. As a result of these events, Lawson took Zhimon to Children's Hospital the next morning.

The trial court granted summary disposition in part because it found the statements identifying the uncle and demonstrating suggestive activity to be inadmissible hearsay. Statements may be both oral and nonverbal. MRE 801(a). However, they may or may not be objectionable as hearsay, depending on the reason why they are offered. If they are not offered to prove the truth of the matters asserted, they are not by definition hearsay. MRE 801(c).

Generally, hearsay evidence is not admissible unless subject to an exception of the rules of evidence. MRE 802; *Morrow v Boffarding*, 458 Mich 617, 621; 581 NW2d 686 (1998). Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. MRE 805.

The emergency department record indicates that Lawson, on behalf of Zhimon, relayed the following hearsay for the purpose of medical diagnosis and treatment, MRE 803(4):

The child was at his uncle's house over the weekend and he told his mother yesterday that he was touched down in the 'bottom part.' When mom asked him in detail, showing him the dolls, he described that his penis was sucked by his Uncle Freddie. This happened probably, on April 26th. No description of anal penetration. No discharge. No bleeding. The Uncle is a known HIV with active disease on multiple medications.

Zhimon was tested for HIV and found negative, but the hospital referred him to an immunology clinic. Zhimon was subjected to a course of HIV preventative treatment from an immunology clinic over the next six weeks. He was tested for HIV two more times after the incident with negative results.

The trial court concluded that the statement of medical history was inadmissible hearsay. The trial court granted summary disposition on the basis that there was no "substantively admissible evidence to demonstrate that Zhimon was sexually abused by [Marks]." Plaintiff argues that the trial court erred, and we agree.

The "Statements made for purposes of medical treatment or medical diagnosis in connection with treatment." exception to the hearsay evidence rule, MRE 803(4), reads:

Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

This exception is premised in part on a vested interest in speaking truthfully to a treating doctor in the pursuit of medical care. *Merrow, supra* at 629. This test is two-pronged. The first is whether the statement is medically relevant. The other is whether the statement is considered trustworthy because it was made under circumstances giving rise to an intrinsic interest in telling the truth. In other words, the medical records exception calls for an independent analysis of the *kind* of statement and the statement's *context*.

The trial court concluded that Zhimon's statements identifying Marks were not medically relevant on the basis of *Cooley v Ford Motor Company*, 175 Mich App 199; 437 NW2d 638 (1988). In that case, the plaintiff sought to admit a statement she made to a doctor explaining where and how her deceased husband – who was himself insufficiently coherent at the time – had been struck on the head. This Court held that the plaintiff's statement to a doctor regarding the existence of the decedent's symptoms and the fact that they might have been caused by trauma was medically relevant. *Id.*, 203-204. However, this Court also held that it was not medically relevant where that trauma took place – in that case, it had taken place at the decedent's place of employment. *Id.*, 204. By analogy, the trial court here found that it was not medically relevant who had allegedly sexually assaulted Zhimon.

However, our Supreme Court has explained that identification of the assailant in a sexual abuse case “is necessary to adequate medical diagnosis and treatment.” *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). To the extent *Cooley* might have been interpreted as holding otherwise, *Cooley* has been overruled.² Identification of a sexual assailant is medically relevant and therefore the *kind* of statement admissible under MRE 803(4). This fact pattern is a particularly good example of the rationale behind the rule. In this case, Marks was known to be HIV positive. That was critically important information for diagnosis and treatment. It was viewed as being sufficiently reliable first by the mother and then by the medical staff to warrant subjecting a two year old to a course of HIV prevention treatment.

The remaining question is whether a *third party's* statement to a doctor, in the pursuit of obtaining medical care *for someone else* can ever satisfy the inherent reliability prong. Significantly, MRE 803(4) does not specify that the statements must be made by the patient. In contrast, MRE 803(3) reads:

² It does not appear that *Cooley* was intended to be interpreted as the trial court found, in any event, given this Court's citation to *People v Wilkins*, 134 Mich App 39; 349 NW2d 815 (1984), for the proposition that the “origin of sexual abuse [is] inextricably related with proper treatment.” *Cooley, supra* at 204.

Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

MRE 803(4) does not explicitly require the statement to be made by the individual seeking medical treatment or diagnosis. It merely requires the statement to be made *for the purpose of* medical treatment or diagnosis. The use of passive voice indicates that the actor is less significant than the act.

A patient has the most obvious vested interest in telling the truth to his or her own doctor. However, it is counterintuitive to presume that a parent would not feel the same interest in telling the truth to his or her child's doctor if the child is unable to do so. This interest may become more attenuated if the speaker is a friend, an acquaintance, or, say, merely a Good Samaritan eyewitness to an accident. However, the key to admission of a non-patient's statement under MRE 803(4), presuming the contents of the statement are medically relevant, turns on the purpose for which the speaker made the statement and the relationship between the speaker and the patient. This may become a factual inquiry. Under the circumstances, we conclude that the statement of a parent of a minor child who is clearly providing information for the purpose of obtaining medical treatment, especially where the child may not be capable of effectively communicating the information personally, should be admitted.

Plaintiff Lawson's statements to medical personnel identifying Zhimon's alleged sexual assailant for the purpose of obtaining medical treatment were, under the circumstances, medically relevant and inherently trustworthy. They satisfy both prongs of the "medical records exception" test under MRE 803(4). Therefore, the trial court erred in excluding them and in granting summary disposition on that basis.

Reversed.

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello

/s/ Alton T. Davis